Sinohydro Corp (M) Sdn Bhd v KAJ Development Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-03(IM)-17–03 OF 2023
HAS ZANAH MEHAT, SUPANG LIAN AND SEE MEE CHUN JJCA
19 JUNE 2023

Civil Procedure — Judgment and orders — Prohibitory order — Setting aside of prohibitory order — Whether there was judgment of monies which had yet to be satisfied — Whether appellant entitled to issuance of order to enforce judgment — Whether prescribed requirements under O 45 r 12 and O 47 r 6 of the Rules of Court 2012 satisfied — Whether there were non-disclosures by appellant — Whether appellant enlarged its remedies as secured creditor to include remedies of unsecured creditor — Whether substratum enabling appellant to proceed with writ of seizure and sale and prohibitory order was gone when adjudication decision was stayed — Construction Industry Payment and Adjudication Act 2012 s 28 — Rules of Court 2012 O 45 r 12 & O 47 r 6(c)

This was an appeal by the appellant against the decision of the High Court in allowing the respondent's appeal against the decision of the deputy registrar who had dismissed the respondent's application to set aside an ex parte prohibitory order ('the PO') granted in respect of 13 parcels of land ('the subject land'). The relevant facts which led to the filing of the PO were as followed: (a) via letter of award dated 6 June 2017 ('the LOA'), the appellant was appointed by the respondent as a contractor for a construction project known as Melaka Gateway Project ('the project'); (b) the works under the LOA comprised reclamation and related works to construct three islands ('the works'); (c) via an amendment letter and security agreement both dated 8 February 2018, the parties agreed that the respondent would create and perfect legal land charges over nine parcels of land in section PME1 of the project in favour of the appellant, failing which the appellant had option to suspend the works or terminate the contract; (d) due to the failure of the respondent to create and perfect the land charges as well as the respondent's failure to pay the relevant payment, the appellant suspended the works; (e) after the suspension of the works, the respondent terminated the contract in March 2019; (f) the court had dismissed the respondent's originating summons for a declaration that the statement of particulars (Form 34) dated 8 February 2018 ('the statement') was misleading, incorrect and/or erroneous, and the court had allowed the appellant's counterclaim that the appellant had a valid equitable charge over the nine parcels of land and for a rectification of the statement; (g) via an adjudication decision under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'), it was determined that the respondent shall pay the appellant the amount of RM205,805,673.05, interest and costs

('the adjudicated sum'); and (h) the respondent's application to set aside and stay the adjudication decision was dismissed by the court and the appellant's application to enforce the adjudication decision was allowed. The High Court's decision in setting aside the PO was premised on the finding that there had been material non-disclosures by the appellant when it applied ex parte for the writ of seizure and sale ('the WSS') and the PO, which warranted an immediate discharge of the PO. In the present appeal, the appellant submitted that: (i) considering that the appellant had shown there was a judgment for the payment of monies which had yet to be satisfied, the appellant was entitled to the issuance of an order to enforce such judgment; and (ii) the appellant had satisfied all the prescribed requirements under O 45 r 12 and O 47 r 6 of the Rules of Court 2012 ('the ROC'). The respondent on the other hands submitted that: (1) there had been non-disclosures by the appellant, such as the facts that the appellant being a secured creditor, the value of the secured land not being what it seemed, and the project being a national project; (2) the appellant had enlarged its remedies as a secured creditor to include the remedies of an unsecured creditor; and (3) the adjudication decision had been stayed on 3 January 2023, as such, the substratum enabling the appellant to proceed with the WSS and PO was gone.

Held, allowing the appeal, setting aside the High Court's order and restoring the order of the deputy registrar with costs of RM15,000 to the appellant subject to allocatur:

(1) Pursuant to O 45 of the ROC, the seizure of land to enforce the judgment for the payment of money can be through a WSS where the procedure was provided in O 47 r 6 of the ROC and para (c) in particular spelled out what the ex parte application ought to disclose. In the present case, the adjudication sum had been obtained through the adjudication decision whereby the High Court had allowed its enforcement pursuant to s 28 of the CIPAA. This meant the adjudication decision could be enforced as if it was a judgment of the court. It was not disputed that this money had yet to be paid even as of today. The appellant was therefore entitled to enforce the valid adjudication decision where the execution proceedings such as PO was specifically provided in O 47 particularly r 6, and in the context of this appeal, more particularly paras (a)–(c) (see paras 36 & 39–40).

(2) The court found that the material facts to be set out under O 47 r 6(c) of the ROC had been disclosed. These pertained to the enforcement order, the respondent being the judgment debtor, the unpaid amount under the adjudication decision and enforcement order, the subject land, and the information that the subject land was owned by the respondent. The facts said to be material non-disclosure, to name but a few, such as the appellant being a secured creditor, value of secured land not being what it seemed, and the project being a national project, were not what O 47

r 6(c) required to be disclosed. The court found that the cases relied upon by the respondent did not assist in any way because the court looked only to O 47 r 6 of the ROC to say there had been a disclosure of what was required to be disclosed. The ROC had stated how the execution was to proceed and where the procedure for PO was provided, the court would not go behind the PO (see paras 42, 47 & 58).

(3) There was no merit to the respondent's contention that the appellant had enlarged its remedies as a secured creditor to include the remedies of an unsecured creditor. There had been no authority to the effect that a secured creditor could not proceed with execution proceedings to recover a judgment debt or that the appellant's remedies were limited to realizing the security it held. In fact, O 45 r 1 of the ROC did not make a distinction as to the type of creditor where modes of enforcement were concerned. The appellant was entitled to enforce its judgment as long as it was in accordance with the mode and procedure in O 45 and specifically in O 47 r 6 of the ROC (see paras 59–60).

(4) Paragraphs 63 and 64 of the High Court's grounds of judgment showed that there was no stay of the adjudication decision but only a stay of the execution of the enforcement order. The High Court made it clear in no uncertain terms that the substratum of the PO was very much alive. This thus put paid to the respondent's contention that the substratum to enable the application under O 47 of the ROC was gone such that the PO could not be maintained (see paras 61–62).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap keputusan Mahkamah Tinggi yang membenarkan rayuan responden terhadap keputusan timbalan pendaftar yang telah menolak permohonan responden untuk mengenepikan perintah larangan ex parte ('PO') yang diberikan berkenaan dengan 13 petak tanah ('tanah subjek tersebut'). Fakta berkaitan yang membawa kepada pemfailan PO tersebut adalah seperti berikut: (a) melalui surat tawaran bertarikh 6 Jun 2017 ('ST'), perayu telah dilantik oleh responden sebagai kontraktor untuk projek pembinaan yang dikenali sebagai Melaka Gateway Project ('projek tersebut'); (b) kerja-kerja di bawah ST tersebut terdiri daripada penambakan dan kerja-kerja berkaitan untuk membina tiga pulau ('kerja-kerja tersebut'); (c) melalui surat pindaan dan perjanjian sekuriti kedua-duanya bertarikh 8 Februari 2018, pihak-pihak bersetuju bahawa responden akan membuat dan menyempurnakan cagaran tanah ke atas sembilan bidang tanah dalam seksyen PME1 projek tersebut untuk perayu yang mana jika gagal perayu mempunyai pilihan untuk menggantung kerja-kerja tersebut atau menamatkan kontrak tersebut; (d) disebabkan kegagalan responden membuat dan menyempurnakan cagaran tanah tersebut serta kegagalan responden membayar bayaran yang berkaitan, perayu menggantung kerja-kerja tersebut; (e) selepas penggantungan kerja-kerja tersebut, responden telah menamatkan

kontrak tersebut pada Mac 2019; (f) mahkamah telah menolak saman pemula responden untuk pengisytiharan bahawa Penyata Butiran (Borang 34) bertarikh 8 Februari 2018 ('Penyata tersebut') adalah mengelirukan, tidak betul dan/atau tersilap, dan mahkamah telah membenarkan tuntutan balas perayu bahawa perayu mempunyai cagaran tanah yang sah dan saksama; (g) melalui keputusan adjudikasi di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP'), telah diputuskan bahawa responden hendaklah membayar kepada perayu jumlah RM205,805,673.05, faedah dan kos ('jumlah adjudikasi'); dan (h) permohonan responden untuk mengenepikan dan menangguhkan keputusan adjudikasi tersebut telah ditolak oleh mahkamah dan permohonan perayu untuk menguatkuasakan keputusan adjudikasi tersebut telah dibenarkan. Keputusan Mahkamah Tinggi mengenepikan PO tersebut adalah berdasarkan dapatan bahawa terdapat ketidakdedahan material oleh perayu apabila ia memohon ex parte untuk writ penyitaan dan penjualan ('WSS tersebut') dan PO tersebut, yang mewajarkan pelepasan serta-merta PO tersebut. Dalam rayuan semasa, perayu berhujah bahawa: (i) memandangkan perayu telah menunjukkan terdapat penghakiman untuk pembayaran wang yang masih belum dipenuhi, perayu berhak untuk mendapatkan perintah untuk menguatkuasakan penghakiman tersebut; dan (ii) perayu telah memenuhi semua keperluan yang ditetapkan di bawah A 45 k 12 dan A 47 k 6 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012'). Responden sebaliknya berhujah bahawa: (1) terdapat ketidakdedahan yang dibuat oleh perayu, seperti fakta bahawa perayu adalah pemiutang bercagar, nilai tanah bercagar tidak seperti yang dilihat, dan projek tersebut adalah projek nasional; (2) perayu telah memperbesar remedinya sebagai pemiutang bercagar untuk memasukkan remedi pemiutang tidak bercagar; dan (3) keputusan adjudikasi tersebut telah digantung pada 3 Januari 2023, oleh itu, substratum yang membolehkan perayu meneruskan WSS dan PO tersebut telah hilang.

Diputuskan, membenarkan rayuan, mengenepikan perintah Mahkamah Tinggi dan mengembalikan perintah penolong pendaftar dengan kos RM15,000 kepada perayu tertakluk kepada alokatur:

(1) Menurut A 45 KKM 2012, penyitaan tanah untuk menguatkuasakan penghakiman bagi pembayaran wang boleh dibuat melalui WSS di mana prosedur telah diperuntukkan dalam A 47 k 6 KKM 2012 dan perenggan (c) khususnya menyatakan perkara yang perlu didedahkan oleh permohonan ex parte. Dalam kes ini, jumlah adjudikasi tersebut telah diperolehi melalui keputusan adjudikasi tersebut di mana Mahkamah Tinggi telah membenarkan penguatkuasaannya menurut s 28 APAIP. Ini bermakna keputusan adjudikasi tersebut boleh dikuatkuasakan seolah-olah ia adalah penghakiman mahkamah. Tidak dipertikaikan bahawa wang ini masih belum dibayar sehingga hari ini. Oleh itu perayu berhak untuk menguatkuasakan keputusan adjudikasi yang sah tersebut

di mana prosiding pelaksanaan seperti PO telah diperuntukkan secara khusus dalam A 47 khususnya k 6, dan dalam konteks rayuan ini, terutamanya perenggan (a) hingga (c) (lihat perenggan 36 & 39–40).

(2) Mahkamah mendapati fakta material yang akan dinyatakan di bawah A 47 k 6(c) KKM 2012 telah didedahkan. Ini berkaitan dengan perintah penguatkuasaan, responden sebagai penghutang penghakiman, jumlah yang belum dibayar di bawah keputusan adjudikasi tersebut dan perintah penguatkuasaan, tanah subjek, dan maklumat bahawa tanah subjek tersebut dimiliki oleh responden. Fakta yang dikatakan sebagai ketidakdedahan material, antaranya seperti perayu sebagai pemiutang bercagar, nilai tanah bercagar tidak seperti yang dilihat, dan projek tersebut sebagai projek nasional, bukanlah apa yang perlu didedahkan di bawah A 47 k 6(c). Mahkamah mendapati bahawa kes-kes yang disandarkan oleh responden tidak membantu dalam apa-apa cara kerana mahkamah hanya melihat kepada A 47 k 6 KKM 2012 untuk mengatakan terdapat pendedahan tentang apa yang perlu didedahkan. Kaedah-Kaedah Mahkamah 2012 telah menyatakan bagaimana pelaksanaan akan diteruskan dan di mana prosedur untuk PO telah dinyatakan, mahkamah tidak akan membelakangi PO tersebut (lihat perenggan 42, 47 & 58).

(3) Tiada merit kepada pertikaian responden bahawa perayu telah memperbesar remedinya sebagai pemiutang bercagar untuk memasukkan remedi pemiutang tidak bercagar. Tidak terdapat apa-apa autoriti yang menyatakan bahawa pemiutang bercagar tidak boleh meneruskan prosiding pelaksanaan untuk mendapatkan semula hutang penghakiman atau remedi perayu terhad kepada merealisasikan cagaran yang dipegangnya. Malah, berhubung dengan cara penguatkuasaan, A 45 k 1 KKM 2012 tidak membezakan jenis pemiutang. Perayu berhak untuk menguatkuasakan penghakimannya selagi ia mengikut cara dan prosedur dalam A 45 dan khususnya dalam A 47 k 6 KKM 2012 (lihat perenggan 59–60).

(4) Perenggan 63 dan 64 alasan penghakiman Mahkamah Tinggi menunjukkan bahawa tidak ada penggantungan keputusan adjudikasi tetapi hanya penggantungan pelaksanaan perintah penguatkuasaan. Mahkamah Tinggi menyatakan dengan terang dan jelas bahawa substratum PO tersebut masih berkuatkuasa. Oleh itu, ini telah menafikan hujahan responden bahawa substratum untuk membolehkan permohonan di bawah A 47 KKM 2012 telah hilang yang menyebabkan PO tersebut tidak dapat dikekalkan (lihat perenggan 61–62).]

Cases referred to

AIC Ltd v Federal Airports Authority of Nigeria [2022] 1 WLR 3223, SC (distd)
Aristocrat Technologies Australia Pty Ltd and others v Allam and others [2016] 327 ALR 595, HC (distd)
Ban Hin Lee Credit Sdn Bhd v Utama Computer Centre Sdn Bhd & Ors [1991] 2 MLJ 327, HC (refd)
Econpile (M) Sdn Bhd v ASM Development (KL) Sdn Bhd [2021] MLJU 1340; [2021] 9 CLJ 896, HC (refd)
Indacon Sdn Bhd v DMC Development Sdn Bhd [2019] MLJU 1046; [2019] 1 LNS 1369, HC (refd)
International Finance Trust Co Ltd and another v New South Wales Crime Commission and others (2009) 261 ALR 220, HC (distd)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77, SC (refd)
The Customs and Tax Administration of the Kingdom of Denmark v Sailing Capital Ltd & Ors and other appeals [2022] 1 MLJ 316, CA (distd)

Legislation referred to

Companies Regulations 1966 (repealed by Companies Regulations 2017) Form 34
Construction Industry Payment and Adjudication Act 2012 s 28
Criminal Assets Recovery Act 1990 [AU]
Rules of Court 2012 O 2 r 2, O 45, O 45 r 1, O 47, O 47 rr 6, 6(a), 6(b), 6(c), 12
Uniform Civil Procedure Rules 2005 [AU] r 39.3

Appeal from: *Sinohydro Corp (M) Sdn Bhd v KAJ Development Sdn Bhd and another case* [2023] 10 MLJ 755 (High Court, Kuala Lumpur)

Alex De Silva (with Teo Lee Hoon and Tan Chee Ying) (Tan Chuan Yong & SM Chan) for the appellant.
Loh Siew Cheang (with Carine Cheong Kay Wei and Claudia Nyon Syn Yue) (Cheang & Ariff) for the respondent.

See Mee Chun JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant ('Sinohydro') against the decision of the High Court dated 10 March 2023 to set aside an ex parte prohibitory order ('PO') granted. The PO is in respect of 13 parcels of land ('subject land').

[2] The PO was obtained on 11 November 2022 and the sealed order extracted on 21 November 2022. It was presented for registration on 23 November 2022 at the relevant land office.

[3] On 30 November 2022, the PO was served on the respondent ('KAJ'). A

[4] On 6 December 2022, KAJ applied to set aside the PO, which was dismissed by the deputy registrar ('DR') on 21 January 2023. On 10 March 2023, KAJ's appeal to the judge in chambers was allowed. B

[5] The appeal by Sinohydro was allowed by this court and we now give our reasons.

PARTIES C

[6] Sinohydro is the contractor for works under the Melaka Gateway Project ('project'). KAJ is the master planner and developer of the project.

THE WORKS D

[7] By letter of award dated 6 June 2017 ('LOA'), KAJ awarded to Sinohydro the contract known as 'Design and Build Contract for the Reclamation and Related works for (Part of) 609 acres of land at the Melaka Gateway Project, Melaka' ('the works'). The works comprised reclamation and related works to construct three islands in relation to section PME1, PME2 and PP. E

[8] By an amendment letter dated 8 February 2018 and security agreement also dated 8 February 2018, it was agreed that KAJ would create and perfect legal land charges over nine parcels of land in PME1 in favour of Sinohydro as security for payment for Stage 1 ('secured land'). These were to be done by 8 October 2018, failing which Sinohydro had the option to suspend the works or terminate the contract. F

[9] The land charges were not created and perfected and coupled with what Sinohydro said was KAJ's failure to pay, it suspended the works in October 2018. G

[10] In March 2019, KAJ terminated the contract. H

2019 ORIGINATING SUMMONS ('OS')

[11] In June 2019 KAJ filed its 2019 OS against Sinohydro and Companies Commission Malaysia for a declaration that the statement of particulars (Form 34) dated 8 February 2018 was misleading, incorrect and/or erroneous. Sinohydro filed a counterclaim that it had a valid equitable charge over the nine parcels of land and for a rectification of the statement. On 4 December 2020, KAJ's claim was dismissed and Sinohydro's counterclaim was allowed. I

PROCEEDINGS UNDER CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION ACT 2012 ('THE CIPAA')

[12] On 16 August 2019, Sinohydro commenced adjudication proceedings under the CIPAA against KAJ premised on certified and uncertified payments. By adjudication decision dated 21 October 2020 and amended 4 November 2020 ('adjudication decision'), it was determined that KAJ shall pay Sinohydro the amount of RM205,805,673.05, interest and costs ('adjudicated sum').

[13] KAJ filed its applications to set aside and stay the adjudication decision while Sinohydro filed an application to enforce. On 16 April 2021, the setting aside and stay were dismissed and the enforcement allowed.

WINDING UP AGAINST KAJ

[14] On 24 February 2022, Sinohydro filed a winding up petition against KAJ on grounds of actual insolvency based on the adjudicated sum pursuant to the enforcement order. KAJ filed its application to strike out, on various grounds including that the petition was based on a disputed debt. On 27 June 2022, the petition was struck out.

[15] KAJ was previously wound up on 28 July 2020 upon the application by one Mei He Development Sdn Bhd. The winding up was terminated on 24 January 2022.

ARBITRATION PROCEEDINGS

[16] There are pending arbitration proceedings where the sum being claimed by Sinohyrdo is for about RM348m (which includes the adjudicated sum). There is a counterclaim by KAJ for the sum of about RM739m.

ABOVE EVENTS UNDISPUTED

[17] The events as set out above are not disputed and it forms the backdrop to the application for the ex parte PO and ultimately the decision of the High Court to set aside the PO.

DECISION OF THE HIGH COURT ('HC')

[18] The grounds of judgment of the HC ('GOJ') can be found in encl 19/16–72.

[19] The HC referred to a decision of this court in *The Customs and Tax Administration of the Kingdom of Denmark v Sailing Capital Ltd & Ors and other*

appeals [2022] 1 MLJ 316 for the principles to consider in whether there has been relevant non-disclosure and the consequence for the failure to disclose. In the event of material non-disclosure, an ex parte order may be discharged.

[20] The HC found that there had been material non-disclosures by Sinohydro when it applied ex parte for the writ of seizure and sale and the PO, which warranted an immediate discharge of the PO.

[21] In para 69 of the GOJ, it was said that it is immediately apparent that Sinohydro did not disclose the following material facts. These material facts are set out as follows:

(a) Sinohydro is a secured creditor of KAJ whereby under the security agreement, charges were created in Sinohydro's favour over the Secured Lands as security for the payment of sums payable by KAJ in respect of the project of up to RM724,586,444. It was agreed that the total value of security to be provided by KAJ shall not be less than RM978,191,699.27;

(b) the titles of the Secured Lands are in Sinohydro's possession and Sinohydro has lodged private caveats over the same. The High Court has declared that Sinohydro has an equitable charge over the 9 Plots of Land;

(c) the Subject Lands are distinct from the 9 Plots of Land as the former are not appropriated to Sinohydro as security and are available to unsecured creditors of KAJ involved in the project;

(d) Sinohydro and KAJ have a dispute that is before the Arbitral Tribunal involving Sinohydro's claim for RM348,268,544.59 and KAJ's counterclaim for RM739,200,221.69. The adjudication sum is part of the sums being claimed by Sinohydro in the arbitration;

(e) Sinohydro's petition to wind up KAJ premised on the adjudication sum was struck out by the court on the ground, inter alia, that the said Sum is a disputed debt and Sinohydro did not appeal against the decision. In Sinohydro's AIR in the winding up proceedings, it claimed that the value of the 9 Plots of Land is not enough to satisfy its arbitral claim of RM348,268,544.59. Based on this asserted fact, Sinohydro seized the Subject Lands which it claims has a value of RM240,672,276 according to the report by KPH Property Consultants Sdn Bhd ('KPH');

(f) the value of the Subject Lands in the report by the Liquidator for purposes of the winding up proceedings ie RM915,382,382, is different from the value according to KPH's Valuation Certificate as exhibited in Sinohydro's AIS in respect of the application for the ex parte order; and

(g) the project is an ongoing national project and is part of the Economic Transformation Programme of the nation. In March 2022, KAJ, the State Government of Melaka and the Malaysian Investment Development Authority had promoted the project at the Dubai Expo 2020 to attract foreign direct investments. This is material to the issue of the probable effects of the Ex Parte Order on KAJ and the project.

SUBMISSIONS OF SINOHYDRO

[22] Sinohydro essentially contented there was a distinction between *ex parte* applications for discretionary remedies such as injunctions and that of *ex parte* applications for the issuance of execution orders. When it had shown there was a judgment for the payment of monies, which had yet to be satisfied, it was entitled to the issuance of an order to enforce such judgment.

[23] In respect of an application for writ of seizure and sale ('WSS') and PO, the procedures and disclosures are governed by O 45 r 12 and O 47 r 6 of the Rules of Court 2012 ('the RC 2012'). In this instant application, all the prescribed requirements had been complied with.

SUBMISSIONS OF KAJ

[24] KAJ submitted there had been material non-disclosures which entailed the setting aside of the PO. The setting aside is consistent with O 2 r 2 of the RC 2012 where the rules are a procedural code and subject to the overriding objective of enabling the court to deal with cases justly. *AIC Ltd v Federal Airports Authority of Nigeria* [2022] 1 WLR 3223 was cited for this proposition.

[25] Reference was made to *International Finance Trust Co Ltd and another v New South Wales Crime Commission and others (IFTC)* [2009] 261 ALR 220 where a party asking for an injunction ex parte is duty bound to bring to the court's notice all facts material to the determination of his right to that injunction and this is not confined to cases where equitable relief is sought.

[26] Next was *Aristocrat Technologies Australia Pty Ltd and others v Allam and others* [2016] 327 ALR 595 that the failure of disclosure is ordinarily sufficient to warrant discharge of ex parte orders and this principle is not confined to particular types of interlocutory orders. Its rationale lies in the importance to the administration of justice to the courts and the public being able to have confidence that an order will not be made in the absence of a person whose rights are affected.

[27] *IFTC* and *Aristocrat* meant that the requirements of O 47 r 6 are only enabling in nature and not intended to oust the element of good faith in disclosure, which applies universally.

[28] Added to this is *The Customs and Tax Administration of the Kingdom of Denmark*.

[29] Further, Sinohydro being a secured creditor, cannot seize unencumbered lands belonging to KAJ, as if it is an unsecured creditor. A

[30] It was also submitted that as the adjudication decision had been stayed on 3 January 2023, the substratum enabling Sinohydro to proceed with the WSS and PO is gone. B

OUR DECISION

Ex parte notice of application C

[31] We begin by perusing the ex parte notice of application for execution filed by Sinohydro dated 7 November 2022 (encl 14/166–167) which sets the premise for its PO. This notice of application for the following orders was filed pursuant to O 45 r 12 and O 47 r 6 of the RC 2012: D

(a) That a Writ of Seizure and Sale pursuant to Order 45 Rule 12(1) of the Rules of Court 2012 be issued ordering that all the immovable properties specified in the Schedule A herein (hereinafter referred to as 'the Properties') and the interest of the Defendant/Execution Debtor, KAJ Development Sdn Bhd, in the Properties be attached and taken in execution to satisfy the Judgment or Order dated 16 April 2021 made by the High Court at Kuala Lumpur in Originating Summons No WA-24C-250–12/2020; E

(b) A prohibitory order pursuant to Order 47 Rule 6 of the Rules of Court 2012 and within the meaning of Section 334 of the National Land Code be granted prohibiting the Defendant/Execution Debtor, KAJ Development Sdn Bhd, from transferring, charging or leasing the Properties or any of the Properties or any part of the Properties or any interest in any or any part of the Properties; and for the purpose of this Order 'charging' includes the creation of a lien by deposit of a document of title. F G

[32] The properties in question are the subject land, which is 13 parcels of land. It is not disputed this subject land is not the secured land of the nine parcels of land. H

[33] In para 11 of the affidavit in support (encl 14/119), the deponent has affirmed the following:

11. In accordance with and/or for purpose of Order 47 Rule 6(c) of the Rules of Court 2012, I hereby state as follows: I

(i) The judgment or order to be enforced is the Judgment/Order dated 16.04.2021 referred to or described in paragraph 4 hereinabove and annexed herewith marked as 'ZJY-1';

(ii) The name of the judgment debtor in respect of whose immovable property or interest an order is sought herein is KAJ DEVELOPMENT SDN BHD;

(iii) The amount remaining unpaid under the Judgment/Order at the time of this application is RM250,209,851.94;

(iv) The immovable properties or the interest therein in respect of which an order is sought herein are as described in paragraph 10 hereinabove and specified in the Schedule attached to the Said Application; and

(v) To the best of my information or belief, the said immovable properties are the Defendant's/Execution Debtor's and the source of my information or the grounds for my belief is the land searches conducted on the said immovable properties annexed herewith marked as 'ZJY-3'.

Requirements under O 47 r 6 of the RC 2012

[34] We next refer to the provisions of O 47 r 6 and in particular sub-paras (a) to (c) which provides as follows:

6 Immovable property

Where the property to be seized consists of immovable property or any registered interest therein, the following provisions shall apply:

(a) a seizure shall be made by an order by the court of a Judge prohibiting the judgment debtor from transferring, charging or leasing such property or interest; and for the purpose of this rule 'charging' includes the creation of a lien by deposit of a document of title;

(b) an application for an order under this rule may be made ex parte

(c) by a notice of application;

(d) the application shall be supported by an affidavit —

(i) identifying the judgment or order to be enforced;

(ii) stating the name of the judgment debtor in respect of whose immovable property or interest an order is sought;

(iii) stating the amount remaining unpaid under the judgment or order at the time of application;

(iv) specifying the immovable property or the interest therein in respect of which an order is sought; and

(v) stating that to the best of information of belief of the deponent, the immovable property or interest in question is

(vi) the judgment debtor's and stating the sources of the deponent's information or the grounds for his belief.

[35] What has been disclosed in para 11(c) of the affidavit in support is

exactly what O 47 r 6(c) requires, nothing more and nothing else.

[36] It is also clear that O 45 of the RC 2012 provides the scheme towards the enforcement of any judgment or order for the payment of money, wherein one of the modes for enforcement is by way of WSS. Order 47 deals specifically with WSS and the procedure for seizure of immovable property is spelled out in r 6 as set out above.

[37] Hence, in *Indacon Sdn Bhd v DMC Development Sdn Bhd* [2019] MLJU 1046; [2019] 1 LNS 1369, the following was said:

> [26] ... A monetary entitlement pursuant to a court judgment is plainly enforceable pursuant to the modes of execution provided in O 45 of the Rules of Court 2012 which include the entry of a prohibitory order and sale by auction as envisaged and provided in O 47 rr 6 and 7 of the Rules of Court 2012 respectively. ...

[38] In *Ban Hin Lee Credit Sdn Bhd v Utama Computer Centre Sdn Bhd & Ors* [1991] 2 MLJ 327, the following principle was laid down at p 331:

> Secondly, the detailed requirements to be observed for the seizure of land or an interest therein held by a judgment debtor should be noted; they are contained in O 47 r 6. These together with ss 334–339 of the Code enable the judgment creditor to apply for a prohibitory order to be registered against the land or interest in the land held by a judgment debtor by entry in the Register Document of Title and then to proceed with execution by issue of a writ of seizure and sale to sell the same with a view to satisfying the judgment debt under O 45 r 1 and s 337 ...

[39] Therefore, the seizure of land to enforce the judgment for the payment of money can be through a WSS where the procedure is provided in O 47 r 6 and para (c) in particular spells out what the ex parte application ought to disclose.

[40] The adjudication sum has been obtained through the adjudication decision whereby the HC has on 16 April 2021 allowed its enforcement pursuant to s 28 of the CIPAA. This means the adjudication decision can be enforced as if it is a judgment of the court. It is not disputed that this money has yet to be paid even as of today. Sinohydro is therefore entitled to enforce the valid adjudication decision where the execution proceedings such as PO is specifically provided in O 47 particularly r 6, and in the context of this appeal, more particularly paras (a) to (c).

[41] We also refer to *Econpile (M) Sdn Bhd v ASM Development (KL) Sdn Bhd* [2021] MLJU 1340; [2021] 9 CLJ 896 which dealt, inter alia, with the issue of setting aside a PO. As stated in p 906:

> [29] ... I am inclined to hold that the DR did not err in her assessment that ASM has not shown sufficient cause to merit an order to set aside the PO. Econpile has obtained the enforcement order, which has not been stayed or set aside up to the date of the hearing before the Dr Mr Rohan had cited ample authorities to support his submission that the enforcement order is binding, valid and enforceable against ASM ... Econpile is thus entitled to avail itself to the machinery of enforcement by way of WSS of the said land as a means of recovering the judgment debt and to obtain the PO so as to maintain the status quo pending disposal of the said land by sale in the execution proceedings (see too *Indacon Sdn Bhd v DMC Development Sdn Bhd* [2019] MLJU 1046; [2019] 1 LNS 1369). It is only when the total amount of the judgment debt is paid that the judgment ceases to be of any avail (see *United Investment & Finance Ltd v Universal Service Agency* [1965] 2 MLJ 235; [1965] 1 LNS 191), however, judging by ASM's actions until the date of the hearing of the appeal, it is evident that ASM has no intention of obeying the enforcement order.

[42] What was said to be material non-disclosures in para 69(a) to (g) of the HC's GOJ, goes beyond what is required by O 47 r 6(c). They are not non-disclosures, let alone material. We find that Sinohydro has indeed fully complied with O 47 r 6(c) and disclosed all that was required. The RC 2012 has stated how the execution is to proceed and where the procedure for PO is provided, we will not go behind the PO.

Choice of remedies and enforcement

[43] Further, cl 23 of the LOA (encl 11/92) provides as follows:

> 23. Remedies
>
> No remedy conferred by any of the provisions of the Contract is intended to be exclusive of any other remedy conferred in the Contract or which is otherwise available at law, in equity, by statute or otherwise, and each and every other remedy shall be cumulative and shall be in addition to every other remedy given under the Contract or now or hereafter existing at law, in equity, by statue or otherwise. The election of any one or more of such remedies by any of the Parties shall not constitute a waiver by such Party of the right to pursue any other available remedies.

[44] This effectively allows Sinohydro to pursue any remedies available to it and the election of any remedy is not waiver to pursue any other remedy. In para 67 of the GOJ it was stated as follows:

> [67] Upon obtainment of the enforcement order, Sinohydro is not barred from pursuing whatever remedies it has simultaneously or successively or even not all. Nevertheless, when it chose to seek the orders as prayed in the ex parte notice of application, it is incumbent on Sinohydro to make a full and fair disclosure of all the material facts which the DR should know in dealing with the application for the issuance of a WSS and a PO.

[45] The HC had in fact recognised Sinohydro was not barred from pursuing whatever remedies it has, but fell into error by requiring full and fair disclosure outside the confines of O 47 r 6(c).

[46] The pursuit of remedies and the principle that a judgment creditor as is Sinohydro, has been neatly captured in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77. At p 93, this was said:

> Now, it is trite that a chargee/creditor may pursue any or all remedies to recover monies lent by him. He may enforce his statutory charge against the chargor by way of proceedings in rem under s 256 of the Code. He may sue the principal debtor (who may or may not be the chargor) upon the personal covenant contained in any loan agreement that was entered into between the parties. He may proceed against the surety who has guaranteed the loan. And he may pursue all of these courses simultaneously, contemporaneously or successively. See *China and South Sea Bank Ltd v Tan* [1989] 3 All ER 839 at p 842.

CONCLUSION ON DISCLOSURE

[47] To conclude on this issue, the material facts to be set out under O 47 r 6(c) of the RC 2012 have been disclosed. These pertain to the enforcement order; KAJ being the judgment debtor, the unpaid amount under the adjudication decision and enforcement order; the subject land; and the information that the subject land is KAJ's. The facts said to be material non-disclosure, to name but a few, such as Sinohydro being a secured creditor, value of secured land not being what it seems, and the project being a national project, are not what O 47 r 6(c) requires to be disclosed.

REQUIREMENT OF DISCLOSURE AND GOOD FAITH

[48] We now deal with the authorities cited by KAJ on the need for material disclosure and the attendant consequence and what it called the good faith in disclosure.

[49] We certainly do not disagree with *The Customs and Tax Administration of the Kingdom of Denmark*, in particular paras 57 to 59 which held that there is a duty to make full and fair disclosure in ex parte applications and such material non-disclosure may lead to the discharge of the ex parte order. However, this onerous and compelling duty was in the light of mareva injunctions where it is long recognised that material non-disclosure will certainly result in an ex parte order being set aside.

[50] Likewise, we do not disagree with the need to deal with cases justly as stated in *AIC Ltd*, except that our case deals with the enforcement of an order with prescribed procedure as per O 47 r 6 of the RC 2012.

[51] *IFTC* at p 256 essentially stated that a party asking for an injunction ex parte is duty bound to bring to the court's notice all facts material to the determination of his right to that injunction. At p 257, it was further stated:

> [132] The decision in *Edison* can be understood as a particular application of the equitable maxim that a party who seeks equity must do equity. But the obligation to make proper disclosure when seeking relief from a court without notice to the opposite party should not be understood as confined to cases where equitable relief is sought.

[52] Although *IFTC* suggests that disclosure is not necessarily confined to equitable relief, that case itself dealt with an *ex parte* restraining order under the New South Wales Criminal Assets Recovery Act 1990.

[53] With regard to *Aristocrat*, reliance was placed in particular on para 15 at pp 599–600 as follows:

> [15] It is an elementary principle of our ordinarily adversarial system of justice that full and fair disclosure must be made by any person who seeks an order from a court ex parte, with the result that failure to make such disclosure is ordinarily sufficient to warrant discharge of such order as might be made. The principle is not confined to particular types of interlocutory orders. Its rationale lies in the importance to the administration of justice of the courts and the public being able to have confidence that an order will not be made in the absence of a person whose rights are immediately to be affected by that order unless the court making the order has first been informed by the applicant of all facts known to the applicant which that absent person could be expected to have sought to place before the court had the application for the order been contested.

[54] The submission of KAJ was that this related to levy of property and what is required to be stated in the application is similar to our WSS. It is said this is evident from r 39.3 Uniform Civil Procedure Rules 2005 (encl 49/239–240).

[55] Sinohydro in turn stated with reference to para 5 of the case that the issue there was the non-compliance of r 39.3(c) relating to certificate of taxation of costs.

[56] To better appreciate the arguments, we need to refer to r 39.3 which provides as follows:

> 39.3 Affidavit in support of application for writ of execution
>
> ...
>
> (4) In the case of a writ for the levy of property, the affidavit in support —

(a) must state the amount payable under the judgment, together with any costs and interest payable in relation to the judgment, as at the date of swearing of the affidavit, and

(b) must state the address or addresses at which property belonging to the judgment debtor may be located, and

(c) if the judgment was entered as a result of the filing of a cost assessor's certificate, must include a statement to that effect, together with a statement to the effect that the determination set out in the certificate —

(i) is not subject to any suspension under section 86 of the Legal Profession Uniform Law Application Act 2014 that has not been ended under that section;
and

(ii) is not subject to any suspension under section 90 of the Legal Profession Uniform Law Application Act 2014 that has not been ended under that section.

[57] Looking at the context of *Aristocrat*, it was specifically provided in r 39.3(c) the requirement to state the cost assessor's certificate in certain circumstances and there was no such compliance. This differs from our situation where Sinohydro had stated in its affidavit in support all that was required of it. We are not required to import a disclosure where none exists.

[58] In short, we look only to O 47 r 6 to say there has been a disclosure of what was required to be disclosed. The cases relied on by KAJ do not assist in any way.

ENLARGING REMEDIES AS A SECURED CREDITOR

[59] With regard to Sinohydro enlarging its remedies as a secured creditor to include the remedies of an unsecured creditor, we find there is no merit to that contention. There has been no authority to the effect that a secured creditor cannot proceed with execution proceedings to recover a judgment debt or that Sinohydro's remedies are limited to realising the security it holds. In fact, O 45 r 1 does not make a distinction as to the type of creditor where modes of enforcement are concerned. It reads:

1 Enforcement of judgment or order for payment of money.

(1) Subject to the provisions of these Rules, a judgment or order for the payment of money, not being a judgment or order for the payment of money into court, may be enforced by one or more of the following means:

(a) a writ of seizure and sale;

(b) garnishee proceedings;

(c) in a case in which rule 5 applies, an order of committal.

[60] As was stated earlier, Sinohydro is entitled to enforce its judgment as long as it is in accordance with the mode and procedure in O 45 and specifically in O 47 r 6.

STAY ORDER

[61] On the effect of the stay, it has been stated in paras 63 and 64 of the GOJ as follows:

> [63] With regards to the first ground of appeal, the court agrees with Sinohydro's submission that the effect of the order made by this court on 3 January 2023 is to stay the execution of the enforcement order. This means that the execution of the order made by this court on 16 April 2021 under s 28 of the CIPAA to enforce the AD is temporarily stayed until the hearing and disposal of KAJ's appeal against the decision of this court.
>
> [64] It is very clear to this court that the decision on 3 January 2023 is not a stay of the AD. The substratum of the ex parte order made by the DR on 11 November 2022 is thus very much alive.

[62] This shows that there is no stay of the adjudication decision but only a stay of the execution of the enforcement order. The HC made it clear in no uncertain terms that the substratum of the PO is very much alive. This thus puts paid to KAJ's contention that the substratum to enable the application under O 47 is gone such that the PO cannot be maintained.

CONCLUSION

[63] For the above reasons, we are compelled to allow the appeal. We set aside the HC order dated 10 March 2023 and restore the order of the DR dated 20 January 2023. We award costs of RM15,000 to Sinohydro, subject to allocatur.

Appeal allowed; High Court's order set aside; order of deputy registrar restored with costs of RM15,000 to appellant subject to allocatur.

Reported by Dzulqarnain Ab Fatar